

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MELVIN DWAYNE EISENZIMMER, II,

Defendant-Appellant.

UNPUBLISHED
September 16, 2014

No. 316015
Ingham Circuit Court
LC No. 12-000508-FC

Before: FITZGERALD, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

A jury convicted defendant of three counts of first-degree criminal sexual conduct (CSC I) (personal injury), MCL 750.520b(1)(f), three counts of felonious assault, MCL 750.82, and two counts of domestic violence, MCL 750.81(2). The trial court sentenced defendant to prison terms of 180 to 360 months for the CSC I convictions, 23 to 48 months for the felonious assault convictions, and 93 days for the domestic violence convictions. Defendant appeals as of right. We affirm.

Defendant argues that the prosecutor improperly vouched for the victim's truthfulness during his closing argument when he stated that the victim had no reason to lie. This issue is unpreserved because defendant did not contemporaneously object and request a curative instruction for the alleged misconduct. See *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Accordingly, we review this issue for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Bennett*, 290 Mich App at 475-476. Moreover, we "cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Id.* at 476.

"Issues of prosecutorial misconduct are reviewed on a case-by-case basis by examining the record and evaluating the remarks in context." *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010) (citation and internal quotation marks omitted). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). "When considering a claim of prosecutorial misconduct, the prosecutor's statements should be considered in context, which includes defense counsel's arguments." *People v Cain*, 299 Mich App 27, 36; 829 NW2d 37 (2012), affirmed in part,

vacated in part on other grounds 495 Mich 874 (2013). A prosecutor is “free to argue the evidence and all reasonable inferences from the evidence as it relates to [his or her] theory of the case.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

“[A] prosecutor may comment on his own witnesses’ credibility during closing argument, especially when there is conflicting evidence and the question of the defendant’s guilt depends on which witnesses the jury believes.” *Thomas*, 260 Mich App at 455. For example, “[w]hen a defendant argues that the prosecution’s witnesses testified dishonestly, the prosecutor may respond by arguing that the witnesses had no motive to lie.” *Cain*, 299 Mich App at 36. However, a “prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness’ truthfulness.” *Bahoda*, 448 Mich at 276. Additionally, it is improper for a prosecutor to comment on his or her personal knowledge or belief with respect to a witness’s credibility. *Bennett*, 290 Mich App at 478.

During closing argument, the prosecutor stated that the victim “has no reason to lie here.” Defendant argues that this statement constituted improper vouching that lent weight to Smith’s testimony and deprived him of a fair trial. However, when viewed in context, it is clear that the prosecutor was responding to defendant’s theory of the case and was arguing reasonable inferences from the record, as evidenced by the statements preceding the allegedly improper statement.

During his opening statement, defense counsel alleged that the victim came forward with false allegations that were “strictly vindictive to get back” at defendant for what had occurred the week of April 7, 2012, to April 12, 2012. Further, counsel argued that after hearing all of the testimony, the jury would understand the victim’s motivation for “coming forward with these false allegations.” In line with this proffered defense, during cross-examination of the victim, counsel tried to elicit testimony that she had consensual sex with defendant because he was leaving her. Subsequently, during closing argument, the prosecutor argued in response as follows:

One of the things that is going to happen after we’re done with our arguments is that the judge is going to read you a series of instructions. They’re meant to help you interpret and apply the evidence. One of them is this:

To prove these charges, it is not necessary that there be any evidence other than the testimony of Erica Smith if that testimony proves guilt beyond a reasonable doubt.

What that means is, you have to decide why you believe Erica Smith and how you believe Erica Smith. And the judge is going to read to you some instructions, things to consider when you’re making that evaluation. We talked about these a little bit during jury selection, we went into them a little bit more during opening statements.

One of the most important ones is this:

Does the witness have any special reason to lie?

Did the witness have a bias in this case?

It's because of the relationship between the Defendant and Erica Smith that she stands to gain nothing through these allegations. She breaks apart her family. She loses her husband. It hurts her children. Nothing but loss because of this.

To the extent that he says he's going to throw her out, and there is sort of this implication so that she gets the home and that's why it's only in his name, she told you she went right from there to move in with her mother. This was not about the apartment.

Does she have any reason to tell the truth or any special reason to lie? Whatever this is about, to believe that she's lying, you have to think that she's going to go through the process over the course of nine months, of sitting in front of a SANE nurse and letting her put a colposcope and speculum inside her vagina, take pictures of her anus and of her vagina, take two hours worth of nude photos of her to document her injuries. You'd have to believe that she's going to continue to come in here and show us her dirty underwear covered in blood nine months later after the divorce is final still telling you.

If this story is about her wanting to keep him, as has been suggested during opening and by his testimony, this doesn't accomplish that. This isn't keeping them together. If that's the motive, this wouldn't be the action. Those two are simply inconsistent. If she were fabricating this, why would she admit the part about the consensual oral intercourse from that evening? If she's going to allege a false rape, as has been claimed, then why not make it really violent? She's got the injuries to prove it, but she tells you the story of what happened, her faults and all.

If her motivation is a way out, well, she told you – er, I'm sorry, as the Defendant already told you, even by his own admission she had a clear way out; in that, he admits that he did a domestic assault. She has no incentive to fabricate other charges. So that motive doesn't work either. If it's simply about putting a charge on him, then by both admissions there's a domestic assault. This isn't about that. She has no reason to lie here.

Clearly, the prosecutor was countering defendant's argument that the victim had fabricated the charges. Indeed, the prosecutor framed his arguments in conjunction with the jury instructions, taking care to relate his arguments to why the evidence presented did not show that the victim had any reason to lie.

Furthermore, the prosecutor did not directly indicate or imply that he had special knowledge about the victim's truthfulness. See *Cain*, 299 Mich App at 37. Instead, he merely reiterated the potential motives that defendant suggested gave the victim reason to make false allegations and then explained how the evidence did not support these alleged motives. When

considered in context, the prosecutor's comments were not improper. See *id.* Defendant has failed to establish plain error.

Moreover, the trial court instructed the jury that it had to decide the case based on the evidence and that the lawyers' statements and arguments were not evidence. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Elizabeth L. Gleicher

/s/ Amy Ronayne Krause